corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations.

The Legislature further finds and declares that it is in the interest of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

law and practice. See H.R. Rep. No. 934, 98th Cong. 2d Sess., 1984, 19, reprinted in 1984 U.S. Code Cong. & Ad. News 4655, 4656 (the act "continues reliance on the local franchising process as the primary means of cable television regulation . . ."); S. Rep. No. 67, 98th Cong., 1st Sess., 11 ("the bill restores the jurisdictional framework for cable to its traditional and appropriate balance. That balance continues to give local governments the authority over areas of local concern and authorizes them to protect local needs.")

possible dissemination of information from diverse and antagonistic sources is essential to public welfare), reh'g denied, 326 U.S. 802 (1945).

The jury's finding that cable television is not a natural monopoly is particularly important in this analysis. In a naturally monopolistic industry

> the benefits, and indeed the very possibility, of competition are limited. You can start with a competitive free-for-all--different cable television systems frantically building out their grids and signing up subscribers in an effort to bring down their average costs faster than their rivals--but eventually there will be only a single company, because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs. In the interim there may be wasteful duplication of facilities. This duplication may lead not only to higher prices to cable television subscribers, at least in the short run, but also to higher costs to other users of the public ways, who must compete with the cable television companies for access to them.

Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d at 126. The Eighth Circuit described the phenomenon this way:

> [a] monopoly resulting from economics of scale, a relationship between the size of the market and the size of the most efficient firm such that one firm of efficient size can produce all or more than the market can take at a remunerative price, and can continually expand its capacity at less cost than that of a new firm entering the business. In this situation, competition may exist for a time but only until bankruptcy or merger leaves the field to one firm, in a meaningful sense, competition is self-destructive.

To put this definition in short-hand form, a

natural monopoly is a market that can practically accommodate only one competitor.

controlling the market, then the impact of a single franchise policy on first amendment freedoms would have been much less.[13/] If, because of the cost structure of a cable television system, a monopoly is inevitable, it does not significantly reduce the overall diversity of expression if government accelerates the process by designating the monopolist at the outset, particularly if the cable operator agrees to provide public access channels and facilities and provided that the selection criteria are content-neutral. But see Preferred, 754 F.2d at 1406 (single franchise policy creates serious risk of content discrimination).

However, if competition is feasible and sustainable, then the impact of selecting a single cable television service provider and then excluding all others has an extremely significant effect on expression. As a result, the magnitude of the government interests necessary to justify such an impact on expression must be very substantial. Unfortunately the interests identified by the jury are not sufficiently substantial to justify a government-endorsed monopoly over a particular medium of communication, nor is such a monopoly "essential" to the furtherance of these interests.

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13/ The court emphasizes that it is not expressing an opinion as to whether a single franchise policy would be permissible if the jury had found that cable television is a natural monopoly. See Century Federal, 648 F. Supp. at 1474-77 (rejecting "natural monopoly" as a justification for a single franchising scheme). All this court is saying is that the impact of such a policy on first amendment interests is much greater when cable television is not a natural monopoly.

c. Government's Interest in Financial and Technical Qualifications of Cable Operators

The government's interest in the technical and financial qualifications of cable television system operators is reflected in various sections of the 1984 Cable Act. See 47 U.S.C. § 544 (regulation of services, facilities and equipment), § 552 (consumer protection); it is also reflected in the Act's legislative history:

> This grant of authority to a franchising authority to award a franchise establishes the basis for state and local regulation of cable systems. Other sections of the bill establish certain terms by which such authority may be exercised. In addition, matters subject to state and local authority include, to the extent not addressed in the legislation, certain terms and conditions related to the grant of a franchise (e.g., duration of the franchise term, delineation of the service area), the construction and operation of the system (e.c., extension of service, safety standards, timetable for construction) and the enforcement and administration of a franchise (e.g., reporting requirements, bonds, letters of credit, insurance and indemnification, condemnation, and transfers of ownership).

H.R. Rep. No. 934, 98th Cong. 2d Sess. 59, reprinted in, 1984 U.S. Code Cong. & Admin. News 4655, 4696. The Ninth Circuit has also suggested that local government has a legitimate interest in the "size, shape, quality, [and] qualifications" of cable television operators. Pacfic West, 798 F.2d at 355.

In this case, however, even though the jury found that the public has a significant interest in the technical and financial qualifications of cable television system operators,

it also found that defendants' policy did not promote their interest in having a technically well-qualified cable television system operator. Furthermore, the jury also found that plaintiff has the technical and financial capabilities to construct and operate a cable television system, which suggests that defendants' single franchise policy goes further than necessary in excluding would-be cable television system operators from the market. In fact, there was no showing or argument that a single franchise policy is the only, or even the most effective, way to assure that only technically and financially sound cable television systems are built.[14/] Thus while these constitute significant government interests, the restriction on speech caused by defendants' policy is

> In awarding a franchise or franchises, a franchising authority shall assure that access to cable services is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

47 U.S.C. § 541(a)(3). In adopting this provision, Congress explained:

> Subsection (a)(3) provides that in awarding the franchise, the financing authority shall assure that no class of potential residential cable subscribers is denied cable service due to income or economic status. In other words, cable systems will not be permitted to "redline" (the practice of denying service to lower income areas). Under this provision, a franchising authority in the franchise process shall require the wiring of all areas of the franchise area to avoid this type of practice. However, this would not prohibit a franchising authority from issuing different franchises for different geographic areas within its jurisdiction.

House Report, at 59.

However, Congress' intentions vis-a-vis uniform service has been the subject of controversy. Initially, the Federal Communications Commission ("F.C.C.") interpreted this section as meaning that "the franchising authority shall require that all areas of the franchised area be wired." Notice of Proposed Rulemaking, 49 Fed. Reg. at 48,769 (emphasis added). It subsequently retreated from this position:

> [T]he intent of [section 621(a)(3)] was to prevent the exclusion of cable service based on income and that this section does not mandate that the franchising authority require the complete wiring of the franchise

> area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area.

Report and Order, 50 Fed. Reg. at 18,647. The District of Columbia Circuit recently upheld F.C.C.'s most recent interpretation, reasoning that

> [t]he statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal service. The agency ruling explicitly reaffirms the prohibition against redlining emphasized by the House report. The ACLU argues that the committee report evidences congressional intent that as a practical matter one can only deal with redlining by wiring "all areas of the franchise." Otherwise "an endless variety of 'facially neutral' excuses [could] be used by cable operators to deny cable service to 'unprofitable' parts of a community." Brief for ACLU at 25. We hold that this one sentence from the committee report cannot reasonably be read to so drastically limit the agency's interpretation of the scope of its discretion in accomplishing the legislative goal. See, e.g., FCC v. WNCN Listeners Guild, 450 U.S. 582, 598 (1981) ("The legislative history of the Act . . . provides insufficient basis for invalidating the agency's construction of the Act."); cf. supra II.A.1 at 36-39. Rather, we read the sentence to require exactly what it says: "wiring of all areas of the franchise" to prevent redlining. However, if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited. This is precisely the statement made in the interpretative ruling. It wholly conforms to the statute and the explication in the House report. We therefore uphold the comment as fully consistent with clear congressional intent.

ACLU v. F.C.C., No. 85-1666, slip op. at 62-63 (D.C. Cir. July 17, 1987).

Of course, defendants are free to go further than Congress requires, and again, defendants adopted the policy challenged in this suit prior to the effective date of the 1984 Cable Act. In fact, of all of the interests identified by the jury, the court believes that defendants' interests in assuring uniform service and preventing redlining is the most substantial, inasmuch as it promotes the "widest possible dissemination of information." See Associated Press, 326 U.S. at 20.[15/] Yet as important as the government's interest is in equal and uniform service, it is not sufficiently substantial to justify a government-created, artificial monopoly over a particular medium of communication, particularly when it is not clear that such a monopoly is essential to achieving such uniform service.

e. Government's Interest in Public Access Channels, Etc.

Public access to cablecasting is another interest which Congress saw fit to cover in the 1984 Cable Act, although the Act's provisions are permissive only. 47 U.S.C. § 531.[16/]

15/ The court acknowledges, however, that such a requirement may be challenged as representing "forced speech." See Pacific Gas and Electric, 106 S. Ct. at 909 (first amendment protections include right not to speak).

16/ The Act's access provisions read:

Section 531. Cable channels for public, educational, or governmental use.

(a) Authority to establish requirements with respect to designation or use of channel capacity

(Footnote continued)

Of all the interests identified by the jury, public access is the most controversial.

For example, public access requirements may have their own constitutional infirmities. The Supreme Court has explicitly refused to rule on the first amendment permissibility

H.R. 4103 includes several provisions, specifically those related to PEG and [redacted] which may require that

1984 U.S. Code Cong. & Admin. News 4655, 4668. Two district courts have held that access requirements are constitutional. Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 598-601 (W.D. Pa. 1987); Berkshire Cablevision, 571 F. Supp. at 987; but see Midwest Video Corp. v. F.C.C., 571 F.2d 1025, 1053-57 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979). In each of the cases in which the access requirement was found constitutional, the court nonetheless acknowledged that access infringed upon the rights of the franchisee. Erie, 659 F.2d at 599; Berkshire, 571 F. Supp. at 987.

Moreover, some of the jury's verdicts in this case indicate that defendants' interests were not "unrelated to the suppression of expression," as required under the O'Brien test. The jury found that defendants were motivated to secure public access channels and in kind services by a desire to obtain political support and favor political supporters. The jury also found that defendants used cable television's allegedly naturally monopolistic nature as a pretext to obtain cash payments, in kind services and increased campaign contributions. This suggests that defendants sought to enhance the speech of some while burdening the expression of others -- a result which is contrary to the first amendment values. See Pacific Gas and Electric, 106 S. Ct. at 914 (citing First National Bank of Boston v. Bellotti, 435 U.S. 765, 785-86, reh'g denied, 438 U.S. 907 (1978), and Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)).

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While these motivations do not rise to the level of a "predominant purpose" to suppress speech, see Walnut Properties, 808 F.2d at 1334-35, they nonetheless affect the analysis of whether the defendants' interest in providing public access is sufficiently substantial to justify the impact on expression caused by a single franchise policy. As with the potential constitutional questions surrounding public access, the fact that defendants may have had less than noble motivations in promoting public access diminishes the substantiality of the government's interest in such access and increases the resulting impact on expression.

Finally, even if public access requirements are constitutional, the court is again not persuaded that a single franchise policy is the only effective way to secure such access. The court recognizes that the prospect of a monopoly is more likely to motivate a cable television system operator to accept public access requirements. See Century Federal, 648 F. Supp. at 1476 (offer of exclusive franchise can be used as a "plum" to bargain for certain concessions, e.g., access channels, which may not be obtainable under a competitive system). However, there was no showing that such channels would be uneconomic in a competitive system, particularly if access requirements are uniformly imposed on all cable television system operators.[17/]

17/ Indeed, the new licensing ordinances have such access requirements. See County Ordinance, at §§ 5.75.212, 5.75.214 and 5.75.216; City Ordinance, at §§ 20.5.212, 20.5.214 and 20.5.216.

4. Conclusion

To summarize, defendants bear the burden of proving that the elements of the O'Brien test are satisfied. 754 F.2d at 1406, n.9. The jury's determination that cable television is not a natural monopoly means that the impact of a government-created, "artificial" monopoly over cable television on free expression is tremendous; it means that in the absence of defendants' single franchise policy, competition among cable television systems is feasible. If this is true, then a single franchise policy significantly reduces the diversity of expression available to cable television subscribers.

Under O'Brien, the interests served by a single franchising system must be commensurately substantial. Although the interests identified by the jury are important, they are not sufficiently important to justify the exclusion of all but one speaker from a particular medium -- especially a medium as increasingly important as cable television. Furthermore, the nature of the interests are such that they can be promoted through means which are less restrictive of first amendment rights. Because of this, the court concludes that plaintiff is entitled to judgment in its favor on its first amendment claim.

C. Relief Sought by Plaintiff

By reason of the alleged constitutional deprivations, plaintiff requests: (1) a declaratory judgment establishing plaintiff's right to construct, install and operate a cable television system within Sacramento County; (2) a permanent

injunction enjoining defendants from interfering with the rights established in favor of plaintiff under the requested declaratory relief judgment; (3) special and general damages occasioned by defendants' alleged wrongful acts; (4) attorneys' fees and costs pursuant to statute.

Inasmuch as this case is not moot, a declaratory judgment establishing that defendants' single franchising policy violates plaintiff's first amendment rights is appropriate. With respect to its request for injunctive relief, plaintiff indicated at the post-trial hearing that it is seeking two kinds of relief:

1. An order directing defendants to "open up" the utility trenches to which plaintiff has been denied access as a result of defendants' refusal to issue it a franchise in 1983 and/or their refusal to allow plaintiff to lay its conduit while this action was pending; and
2. An order directing defendants to grant plaintiff permission to construct and operate a cable television system.

To issue a permanent injunction, the court must find that the movant has no adequate remedy at law and will suffer irreparable harm if the court denies relief. Burrus v. Turnbo, 743 F.2d 693, 699 (9th Cir. 1984), cert. denied, ___ U.S. ___, 106 S. Ct. 59, vacated as moot, 106 S. Ct. 562 (1985). If damages can compensate a plaintiff, a permanent injunction will not lie.

Holly Sugar Corp. v. Goshen County Cooperative Beet Growers Ass'n, 725 F.2d 564, 569-70 (10th Cir. 1984).

The court finds that money damages could have compensated plaintiff for the extra expense it will incur as a result of having been denied access to utility trenches during the pendency of this suit (assuming such access would have been available even if plaintiff had received permission to build its cable television system). Irrespective of whether plaintiff did or did not present its claims in this respect to the jury, injunctive relief is not appropriate.

However, the court finds that injunctive relief is appropriate with respect to plaintiff's request for permission to build and operate its cable television system. The nature of the relief sought is such that plaintiff has no adequate remedy at law and will suffer irreparable harm if equitable relief is denied.

As already indicated, the issue of damages was submitted to the jury. It found that no damages should be awarded. The court notes that plaintiff objected to defendants' proposed instruction on nominal damages, see Carey v. Piphus, 435 U.S. 247, 266-67 (1978)(denial of constitutional right actionable for nominal damages not to exceed one dollar); as a result, no such instruction was given. The court also determined that this was an inappropriate case for so-called "presumed" damages, inasmuch as plaintiff was actually seeking compensatory damages. See Memphis Community School District v.

Stachura, ___ U.S. ___, 106 S. Ct. 2537, 2545-46 (1986)(presumed damages a substitute for ordinary compensatory damages, not a supplement for such damages); but see City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1558-59 (7th Cir. 1986), aff'd mem., ___ U.S. ___, 107 S. Ct. 919, reh'g denied, 107 S. Ct. 1389 (1987).

Finally, with respect to plaintiff's request for fees and costs, such a request may be made after entry of judgment in accordance with the procedures established in Local Rules 292 and 293 for the Eastern District of California.

IV. ORDER FOR ENTRY OF JUDGMENT

In light of the special verdicts returned by the jury and the determinations and conclusions of law set forth above, the Clerk is directed to enter judgment herein in the following form and content:

"JUDGMENT

Pursuant to the special verdicts of the jury and the determinations and conclusions of law signed and filed by the court on August ____, 1987 (entitled "Memorandum Decision, Conclusions of Law and Order for Judgment"), and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the formulation and implementation of defendants' cable television franchising process, to the extent to which the issuance of a franchise or license to construct and operate a cable television

system in the Sacramento area is restricted to a single successful applicant, constitutes a denial of plaintiff's free speech rights guaranteed by the first amendment to the United States Constitution through the fourteenth amendment;

2. That by reason of the determination in paragraph 1 above, defendants (including their respective officers, agents, servants, employees, attorneys, or any of them) and all persons acting in concert or participation with defendants, or with any of the foregoing, are permanently enjoined and directed to issue to plaintiff, within thirty (30) days herefrom, a license or licenses, to the extent provided for in chapter 5.75 of the Sacramento County Code and chapter 20.5 of the Sacramento City Code, for the construction and operation of a cable television system or systems within the defendants' jurisdictions.

Subject to the provisions hereinafter set forth, a license or licenses issued pursuant to this injunction shall be deemed to be subject to said chapters 5.75 and 20.5, respectively, of the County and City codes; provided, however, that

a. Plaintiff shall be deemed to have reserved to itself the right to challenge, in an appropriate judicial forum, the

validity and/or constitutionality of each or any term or condition in the specified code chapters, although plaintiff shall abide by and comply with any such challenged terms and conditions pending (1) a final determination as to its validity or invalidity by a court of competent jurisdiction or (2) further order of this court;

b. No performance, compliance or adherence of plaintiff to any term or condition of such chapters pursuant to this injunction shall constitute a waiver, estoppel or bar of any type against plaintiff in connection with its judicial challenge, if any, to that term or condition;

c. If at the time of the issuance of licenses pursuant to this injunction plaintiff shall not have theretofore complied with the requirements of any particular provisions of the specified chapters, then subsequent compliance within a reasonable time period, and in any event prior to the commencement of construction, shall be deemed to satisfy such provisions.

In the event that defendants, or either of them, should amend and/or modify the terms and/or conditions of the specified chapters, such amendments and/or modifications shall not become effective as against plaintiff unless and until this injunction shall have been modified to include such amended and/or modified terms and/or conditions.

Nothing contained in this injunction shall be construed to prevent enforcement against plaintiff of the terms and conditions of the specified code chapters or of any code, ordinance or statute not inconsistent with the contents hereof without the further approval and/or review of this court.

Nothing contained in this injunction or in the specified chapters shall be construed to prevent the application by plaintiff and/or defendants to this court for further review of the terms and conditions hereof as appropriate.

3. That plaintiff be awarded nothing by way of money damages against either or both defendants;

4. That any applications for award of statutory costs and/or attorneys' fees shall be served, filed and processed in accordance with the provisions of

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Rules 292 and 293 of Local Rules for the Eastern District of California.

DATED:"

DATED: August 13, 1987

UNITED STATES DISTRICT JUDGE

# APPENDIX A

SPECIAL VERDICT NO. 1

(Not Given)

a. DID DEFENDANTS DENY PLAINTIFF'S REQUEST FOR PERMISSION TO CONSTRUCT AND OPERATE A CABLE TELEVISION SYSTEM IN THE SACRAMENTO METROPOLITAN AREA?

YES _____ NO _____

SPECIAL VERDICT NO. 2

a. WAS THE PREDOMINANT PURPOSE UNDERLYING DEFENDANTS' USE OF THE RFP (REQUEST FOR PROPOSAL) PROCESS TO LIMIT THE ABILITY OF CABLE OPERATORS TO EXPRESS THEIR VIEWS AND EXERCISE THEIR EDITORIAL JUDGMENT?

YES _____ NO _____ NOT ANSWERED X

b. DID DEFENDANTS DENY PLAINTIFF PERMISSION TO CONSTRUCT AND OPERATE A CABLE TELEVISION SYSTEM BECAUSE DEFENDANTS OPPOSE PLAINTIFF'S VIEWS?

YES _____ NO _____ NOT ANSWERED X

c. WAS THE PREDOMINANT PURPOSE UNDERLYING DEFENDANTS' USE AND APPLICATION OF THE RFP PROCESS TO DISCOURAGE EXPRESSION OF ONE VIEWPOINT AND ADVANCE EXPRESSION OF ANOTHER?

YES _____ NO _____ NOT ANSWERED X

d. DOES THE RFP PROCESS APPLY EVENHANDEDLY (I.E. REGARDLESS OF VIEWPOINT) TO ALL ENTITIES DESIRING TO PROVIDE CABLE TELEVISION SERVICE?

YES _____ NO _____ NOT ANSWERED X